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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 646

UNITED MAIL ORDER, WAREHOUSE & RETAIL EMPLOYEES UNION, LOCAL 20, ETC., ET AL.,
Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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AUTHORITIES CITED.

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JURISDICTION.

Petitioners allege that this Court has jurisdiction under 28 U. S. C., Section 1257(3) on the ground that a title, right, privilege or immunity was specially set up or claimed under the Constitution of the United States.

The alleged constitutional questions were never raised until Petitioners filed their Petition for Rehearing in the Supreme Court of Illinois. On pages 16 and 17 of that Petition, Petitioners for the first time claimed that the decisions of the Appellate Court and Supreme Court of Illinois in this case impaired the obligation of their contract in violation of Article I, Section 10, Clause 1 of the Constitution and denied them due process of law in violation of the Fourteenth Amendment. The Supreme Court

II.

The Decision of the State Court Rests Entirely on the Construction of Local Contract Law, and Any Error Therein Presents No Question of Denial of Due Process of Law or Impairment of the Obligation of Contracts.

Even if the alleged constitutional questions had been properly raised in the court below, they are wholly without substance. The decision of the Supreme Court of Illinois rests entirely on the construction of the contract law of the state.

Petitioners seek to recover damages for breach of an injunction bond. The Supreme Court of Illinois decided that: (1) the condition of the bond had not been breached so as to entitle Petitioners to recover, and (2) in any event, recovery would be limited to the $1,000 penalty stated in the bond.

Obviously these are purely questions of local law. *Fox Film Corporation* v. *Muller* (1935), 296 U. S. 207.

The decision of a state court relating only to a question of local statutory or common law, no matter how erroneous, does not deny due process of law. Among the cases so holding is *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.* (1917), 243 U. S. 157, where the court said, pp. 165-166:

> "The claim that the court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

It is equally well settled that the contract clause of the Constitution does not apply to alleged impairment of contract by judicial decision. In *Rooker* v. *Fidelity Trust Company* (1923), 261 U. S. 114, the court said, p. 118:

> "The contract clause of the Constitution, as its words show, is directed against impairment by legislative action, not against a change in judicial decision."

A reading of the opinion of the Supreme Court of Illinois will show that it fairly and correctly disposed of the questions in issue. However, even if this were not true, the most that could be claimed on Petitioners' behalf is that the Illinois Court erred in its interpretation of the contract law of the state. The Petition will be searched in vain for any intimation which goes beyond this claim, other than the bare assertion that the alleged errors infringed Federal constitutional rights.

CONCLUSION.

Respondent respectfully submits that the Petition for Certiorari should be denied, because the alleged Federal constitutional questions were not properly preserved and are lacking in substance.

Respectfully submitted,

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of Illinois denied the rehearing without passing on these questions.

Since no timely claim under the Constitution was presented by Petitioners in this case, this Court lacks jurisdiction to review the decision below.

QUESTIONS PRESENTED.

The questions which Petitioners now seek to present to this Court (Petition pp. 3-5), insofar as they claim the denial of rights under the Constitution of the United States, were not decided by any of the courts below. The questions presented to the courts below and decided by them involved only questions of Illinois law.

STATEMENT OF THE CASE.

Petitioners' statement of the case (Petition pp. 6-13) is controverted.

In order that the Court may understand the issues in the present case, a summary of the proceedings in three previously contested matters should be presented before the facts of the present case are set forth. Inasmuch as the parties have at different times occupied the positions of both plaintiffs and defendants, Respondent believes that it will avoid confusion if Petitioners are referred to collectively in this Statement of the Case as "the Union" and Respondent is referred to as "Wards."

(1) The Original Injunction Suit.

In 1943 Wards filed in the Superior Court of Cook County, Illinois, its Complaint in Equity against the Union alleging that the members of the Union had conspired to libel and vilify Wards for the purpose of injuring Wards' business and reputation. The Complaint prayed for a

temporary and permanent injunction against continued publication of libelous statements, and asked for damages of $1,000,000 for past libels (Abst. 26-27).

On June 25, 1945, the Superior Court denied the Union's motion to dismiss the action and granted Wards' motion for a temporary injunction, to be effective upon the Court's approval of an injunction bond in the amount of $1,000 (Abst. 30-32). The temporary injunction prohibited the Union members from conspiring to publish *untrue* statements concerning Wards for the purpose of causing Wards' employees and customers to fear, dislike, or distrust Wards, its officers or supervisory employees (Abst. 30-32, 35). On June 26, 1945, the injunction bond sued on in this case, in the amount of $1,000, was filed and approved (Abst. 32-34).

On July 6, 1945, the Union filed a motion to vacate and set aside the order of June 25 (Abst. 35). The Court denied the motion and, the Union refusing to plead further, the Court on that date entered a final order making the injunction permanent (Abst. 36).

The Union appealed to the Appellate Court of Illinois from the final order of July 6, 1945. Contrary to the statement on page 10 of the Petition, it did not appeal from the order of June 25 granting the temporary injunction. In November 1946 the Appellate Court reversed the Trial Court with directions to "dismiss the complaint for want of equity" (330 Ill. App. 49, 70 N. E. 2d 75). Wards then appealed to the Supreme Court of Illinois, which, in March 1948, affirmed the judgment of the Appellate Court (400 Ill. 38, 79 N. E. 2d 46).

(2) The First Petition for Damages Under Section 12 of the Illinois Injunction Act.

In June 1948 the Union filed in the Superior Court of Cook County, Illinois a Suggestion of Damages under Section 12 of the Illinois Injunction Act (Illinois Revised Statutes, Chapter 69, Sec. 12), which is quoted on page 5 of the Petition. The Union claimed damages of $453,750 alleged to have resulted from the issuance of the *temporary* injunction, including organizational expenses, loss of union dues, attorney fees and court costs (Abst. 268-273). Wards moved to strike and dismiss the suggestion of damages on the grounds, among others, that the temporary injunction of June 25, 1945, had not been dissolved but had merged in the final order of July 6, 1945, and had thereby become *functus officio* (Abst. 273). The Union then filed, for the first time, a motion to dissolve the temporary injunction (Abst. 55). The Superior Court granted Wards' motion to strike and dismiss the suggestion of damages and denied the Union's motion to dissolve the temporary injunction (Abst. 277-278). No appeal was taken from this judgment.

(3) The Second Petition for Damages Under Section 12 of the Illinois Injunction Act.

Almost two years later, in April 1950, the Union filed in the Superior Court of Cook County, Illinois a second petition for damages under Section 12 of the Illinois Injunction Act (Abst. 278-290). The items of damage claimed were the same as those alleged in the 1948 Petition, although the amount claimed was increased from $453,750 to $730,000. Wards moved to strike and dismiss the second petition upon the same grounds as it had moved to strike and dismiss the first petition, and on the additional ground

that the order entered on the first petition was a final order which had previously adjudicated all of the matters presented in the second petition (Abst. 291-299). The Superior Court granted Wards' motion and dismissed the second petition (Abst. 299).

The Union appealed to the Appellate Court of Illinois, which affirmed the Trial Court's order (348 Ill. App. 198, 108 N. E. 2d 784). The Union then petitioned the Supreme Court of Illinois for leave to appeal but that Petition was denied in March 1953.

(4) The Present Suit on the Injunction Bond.

In March 1953, shortly after the denial of the Union's petition for leave to appeal, the Union filed in the Municipal Court of Chicago, Illinois, the present contract action for damages on the $1,000 injunction bond (Abst. 1-6). The items of damage claimed were the same as those alleged in the petitions filed by the Union in the Superior Court in 1948 and 1950, and the amount claimed for each item was identical to the amount claimed in the second petition filed in the Superior Court. In addition to these previously claimed items of damage, the Union asked for $70,000 to cover its attorneys' fees and court costs in prosecuting its two petitions for injunction damages in the Superior Court and in prosecuting the present case (Abst. 6). Wards' motion to strike and dismiss the Union's statement of claim was denied by the Municipal Court (Abst. 16). Trial before the Municipal Court without a jury resulted in a judgment of $327,000 in favor of the Union (Abst. 23). Wards appealed from said judgment to the Appellate Court of Illinois. That Court reversed the judgment on the grounds: (1) that the Union was without legal capacity to sue, (2) that the maximum permissible recovery was limited to the $1,000 penal sum named in

the bond, and (3) that the Union was not entitled to recover for damages incurred before the temporary injunction was issued on June 25, 1945, or after it was merged in the permanent injunction of July 6, 1945. The Appellate Court therefore reversed the judgment and remanded the case to the Municipal Court for a new trial (6 Ill. App. 2d 477, 128 N. E. 2d 645).

On motion of the Union the Appellate Court's Order was amended so as to strike out the remanding portion, in order to lay a basis for appeal to the Supreme Court of Illinois (Abst. 370).

The Union obtained leave to appeal to the Supreme Court of Illinois. That Court affirmed the judgment of the Appellate Court on the grounds that, under the terms of the injunction bond, recovery thereon was limited to $1,000 and that, since the temporary injunction had never been dissolved but had merged in the final injunction, the condition of the bond had never been breached (Petition, App. A, 9 Ill. 2d 101, 137 N. E. 2d 47).

The Union filed a Petition for Rehearing in the Supreme Court of Illinois in which it asserted for the first time that it had been deprived of rights under the Constitution of the United States. The Supreme Court amended its opinion in respects not here material (Petition, App. B), and denied the Petition for Rehearing, without referring to the constitutional questions sought to be presented.

The aforesaid decision of the Supreme Court of Illinois is the one here sought to be reviewed.

ARGUMENT.

I.

The Alleged Constitutional Questions Are Not Properly Before This Court Because They Were First Raised by Petitioners in Their Petition for Rehearing Before the Supreme Court of Illinois.

As pointed out in the jurisdictional statement, Petitioners' claim of impairment of the obligation of contracts and denial of due process of law was first raised in the Petition for Rehearing which Petitioners filed after the decision of the Supreme Court of Illinois. Since that decision affirmed the judgment of the Appellate Court, there is no basis for any claim by Petitioners that they were surprised by the Supreme Court's decision.

Although the Supreme Court amended its opinion on rehearing in respects not here material, it did not refer to the alleged constitutional questions.

Under these circumstances it is well settled by a long line of cases that the Federal questions were raised too late. As the Court said in *Rooker* v. *Fidelity Trust Company* (1923), 261 U. S. 114, 117:

> "All that appears is that after the judgment of affirmance the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late."

See also the more recent decision to the same effect in *Radio Station WOW* v. *Johnson* (1945), 326 U. S. 120, 128.